

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Acceleration of Broadband Deployment)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

COMMENTS OF THE CITY OF CONCORD, NORTH CAROLINA

I. Introduction

The City of Concord (Concord) is a North Carolina municipal corporation created by the North Carolina General Assembly.¹ Concord files these comments in response to the April 7, 2011 Notice of Inquiry (NOI) and seeks to provide the Commission with some information regarding Concord's local right-of-way (ROW) real property and facility management practices and charges². The Commission should not interfere with Concord's practices and policies. Concord has developed considerable expertise applying its policies and procedures to protect and

¹ Concord is a city of 80,000 adjacent to Charlotte. Concord owns and operates four utility systems located in rights-of-way, City-owned easements and City property owned in fee. The four utility systems are the wastewater collection, electricity distribution, potable water and storm water utilities. Concord and the NC Department of Transportation each control a portion of the street network.

² Concord uses the term "charges" to include both any cost recovery that is part of the ROW and facility management (such as permitting fees) as well as rents Concord receives from pole attachment agreements and use of the ROW from communications companies all as provided by North Carolina statute and Concord ordinance.

further public safety, economic development, preservation of Concord's and other utilities investments in the ROW, and many other community interests. By adopting rules in this area, the Commission could disrupt this process at substantial cost to local taxpayers and to the local economy. Concord believes that a basic respect for federalism, a fair reading of the Constitution and the Communications Act, and an honest assessment of the Commission's limited expertise on local land use matters all point to the same conclusion: this is no place for federal regulation.

Concord has successfully managed its property to encourage deployment of several broadband networks to date. As a result, broadband service is available in close to one hundred percent (100%) of the households and businesses in Concord. There is no evidence that Concord's policies or charges with respect to placement of facilities in the rights-of-way or on City properties (such as water towers, and City-owned communications towers) have discouraged broadband deployment. Concord *welcomes* broadband deployment, and our policies allow us to work with any company willing to provide service. No company has cited our policies as a reason that it will not provide service. We believe our policies have helped to *avoid* problems and delays in broadband deployment by ensuring that broadband deployment goes smoothly for both the providers who follow the rules and the larger community. Both Windstream and Time Warner use City rights-of-way for their facilities through encroachment permits. Windstream and Time Warner use City electric infrastructure under pole attachment agreements. Concord has also granted temporary licenses for "Cells on Wheels" at the City water tower adjacent to a large NASCAR venue during NASCAR races. On the other hand, we also know that many entities seeking access to our rights-of-way and facilities would prefer to

live without rules or regulations to the great detriment of other users, abutting landowners, commuters, and the general taxpayer.

II. *Concord's Procedures and Requirements Regarding Rights-of-Way*

In response to the NOI, Concord begins by providing an overview of “practices” with respect to the use of “rights-of-way” (ROW), and placement of wireless facilities on other Concord properties, and will then discuss the goals served by those practices. Most of the discussion of ROW focuses on existing streets. Concord’s policies and practices are constantly evolving. Concord adjusts its policies and ordinances to accommodate new users, technologies and changing circumstances.

The Commission may use the term “right-of-way” in reference to areas other than public streets.³ Concord’s comments will focus primarily on policies regarding streets, highways and ROW. A secondary focus will be the placement of communication facilities on other properties.

Through the permitting process, Concord attempts to ensure that construction proceeds in an orderly manner that minimizes disruption of traffic, and avoids damage to other vital utilities in the rights-of-way. Significant public safety issues arise even when companies are engaged in seemingly innocuous activities, such as the addition of a new guy wire for a utility pole (an addition often required by collocation of new facilities on a pole). Concord’s permitting process

³ NOI ¶5 n.11 (noting that “[f]or purposes of this proceeding, the term ‘right of way practices’ includes all procedural and administrative requirements associated with access to and use of rights of way or wireless facilities siting.”) While we use this phrase for shorthand purposes and for consistency with the NOI, this phrase is actually a misnomer because “wireless facilities siting” need not involve right-of-way use. The Commission appears to be combining distinct practices.

focuses not on how the work may be classified, but instead to focus on the nature of the work to be performed (and its impact), where it is to be performed, when it is to be performed, how long it will take to perform the work, and who is to perform it.

(A) USE OF RIGHTS-OF-WAY - Concord City Council routinely grants permanent ROW encroachments upon completion of an application (including plans of the proposed encroachment) and payment of a \$75.00 fee. This fee does not reimburse the City for its expenses in writing the agreement, recording the agreement in the deed registry or City Council's review of the agreement. Once an application and fee is received it is reviewed by a City staff registered professional engineer. If the application is complete, it is placed on the next City Council meeting agenda. The entire process takes 2 to 4 weeks, depending on the City Council's meeting schedule. The City's policies and procedures are published on the City web site and in the Code of Ordinances.⁴

(B) POLE ATTACHMENTS – Since the creation of the City's electrical system in the early Twentieth Century, Concord has worked closely with all telecommunication providers, particularly the Concord Telephone Company (CTC), now Windstream. CTC was also formed in the early Twentieth Century. Since that time, Concord and CTC (now Windstream) have shared poles. Other communication providers are also allowed to share poles, such as Time Warner.

⁴ City of Concord Code of Ordinances, §§ 50-52, 50-53 (Municipal Code Corp., Tallahassee, FL, 208)
http://library1.municode.com/default-test/home.htm?infobase=10986&doc_action=whatsnew.

Almost all of Concord's electric utility poles are located in the ROW. Businesses wishing to make attachments to City-owned electric power poles may enter into a pole attachment agreement. The cost to the user is based on the number of attachments. The City pays for attachments to poles owned by other entities. In some cases the net cost to a user who also owns a significant number of poles is small. For example, Windstream and Concord have a similar number of attachments on each other's poles, making the net cost to each of attachments quite small. The City considers terms proposed by the user(s) and will negotiate unique agreements for each user. The pole attachment agreements are all public records. Concord charges \$15.00 per pole attachment to existing poles, or a 1:1 trade for an attachment to a pole owned by another entity. In 2009 the NC General Assembly adopted a statute⁵ requiring municipalities and electric membership co-ops to use any pole, duct or conduit for a reasonable, non-discriminatory rate.⁶ If an agreement cannot be reached in 90 days either party may bring an action in the NC Business Court.⁷ The Business Court has the authority to set the rate retroactively to the date of the end of any previous agreement or to the date of the end of the 90-day negotiating period.⁸ In the absence of an agreement, the statute provides standards for ensuring the safety and reliability of the system.⁹ Test cases are moving through the state court

⁵ NC General Assembly Session Law 2009-278, Senate Bill 357, creating §62-55 "Regulation of Pole Attachments" July 10, 2009.

⁶ NC Gen. Stat. §62-55 (a).

⁷ NC Gen. Stat. §62-55 (b) and (c).

⁸ *Id.*

⁹ NC Gen. Stat. §62-55 (d).

system.¹⁰ By either Concord's practice and/or General Statute, a regulatory program to ensure that communications companies are treated fairly already exists in NC. Further regulation by the FCC is not warranted.

III. *Concord's Procedures and Requirements Regarding Other City Properties*

(A) CONCORD'S COMMUNICATION TOWERS - Concord owns two 300 foot tall towers for the purposes of public safety communication. Typically all antenna spaces not required for public safety are leased on a first-come/first-served basis at competitive rates. There are currently four (4) lessees on Concord's primary tower which is located at the Fire Department's headquarters (at least three vacant spaces now available). No applicant willing to enter into the City's lease and pay rent has been denied co-location. The leases are public records. The City considers terms proposed by the user(s) and will negotiate unique agreements for each user.

(B) CONCORD'S WATER TOWERS and TANKS - Concord has an active program to lease antennae space on its water towers at competitive market rates. All such leases are approved by the City Council. Concord routinely modifies its form documents to accommodate reasonable requests. It takes as little as 30 days to obtain a lease, although 45 to 60 days is typical.

IV. *Concord's Procedures and Requirements Regarding Subdivision and Zoning*

(A) SUBDIVISION DEVELOPMENTS - Through the platting process, Concord uses its police powers to oversee new subdivisions, and to incorporate these developments into the

¹⁰ *E.g. Time Warner Entertainment-Advance/Newhouse Partnership v Town of Landis*, 10 CVS 1172.

City¹¹. The platting process ensures that these developments are constructed safely, and it advances the community's orderly growth. As part of this process, Concord requires the dedication and construction of utility easements, streets, and public rights-of-way.¹² Generally, developers and utilities reach agreement as to where utilities will be placed before the streets are dedicated or placed under City control, management and maintenance. Either staff or the Planning & Zoning Commission then approve the final plats, depending on the size and complexity of the plat¹³. Finally after the completion of construction, the City Council formally accepts the roads, ROW and utility easements for City ownership and perpetual maintenance of streets, sewers, storm sewers, water lines, and electric lines and poles.¹⁴ This process is related to, but in critical respects distinct from, other right-of-way permitting processes. It necessarily is more time-consuming, as it involves planning for the coordinated installation and construction of all infrastructure. Should the Commission wish to investigate subdivision development, it will need to examine State and local subdivision laws carefully.

(B) ZONING of COMMUNICATIONS INFRASTRUCTURE – While Concord's zoning ordinances varies from its neighbors based on Concord's needs, it includes standard components and follows a similar structure to others in North Carolina. Concord requires an applicant to describe the facility and its proposed location. Antennae and supporting structures are allowed

¹¹ City of Concord Code of Ordinances, Concord Development Ordinance Art. 5 §5.1. *et seq.* (2011 edition.)

¹² City of Concord Code of Ordinances, Concord Development Ordinance §5.2.2.C. (2011 edition.).

¹³ City of Concord Code of Ordinances, Concord Development Ordinance §5.1.1.B. (2011 edition.)

¹⁴ City of Concord Code of Ordinances, Concord Development Ordinance §5.7.9. (2011 edition.); N.C. Gen. Stat. §160A-374.

in all zoning districts.¹⁵ Supplemental regulations apply to towers in some zoning districts.¹⁶ The Planning Department staff may approve all “wireless communications facilities” except for new, freestanding unconcealed (i.e. non-stealth) towers. If applications are complete, the time for review and approval is about 2 weeks. New freestanding towers are reviewed by the Planning & Zoning Commission after 10 days advertisement, as required by General Statute¹⁷ The Planning Commission holds a quasi-judicial hearing on each application, also as required by statute.¹⁸ The typical time to obtain a permit is 45 days. The governing ordinances, application fees and related forms are published on the City’s website.¹⁹

V. Sources of Delays.

The Commission asks what factors are chiefly responsible to the extent applications are not processed in a timely fashion. The Commission also asks about errors or omissions in applications.²⁰

In Concord, most applications are processed very quickly. However, in some cases, applicants do not submit complete applications, or the required fees. In other cases, the

¹⁵ City of Concord Code of Ordinances, Concord Development Ordinance §8.4.1.A. (2011 edition.)

¹⁶ City of Concord Code of Ordinances, Concord Development Ordinance §8.7 Wireless Communication Facilities (2011 edition.)

¹⁷ N.C. Gen. Stat. §§160A- 384 and 160A-364.

¹⁸ N.C. Gen. Stat. §160A-393.

¹⁹ <http://interconcord.coc/Departments/Finance/Adopted-Fees-Schedule>; <http://interconcord.coc/Government/City-Ordinances>.

²⁰ NOI ¶ 14.

applicants do not respond to City letters and e-mails. The length of time an application, lease or contract may take is largely in the control of the applicant.

Concord provides standard form agreements for attachment to the City's utility poles or for attachment to Concord's cell tower. The agreements are signature ready when provided.

Any and all delay in execution of the agreements are the result of:

- i) Extended initial review periods by the applicant from two to six months; and/or
- ii) Protracted negotiations regarding applicant's proposed changes to the City's standard terms; and/or
- iii) Complete lack of communication from the applicant.

The City responds to proposed changes as quickly as possible and generally within a week or two of receipt of such proposal. Some applicants typically take months to respond to drafts.

VI. Improvements.

The Commission asks whether there are particular practices that can improve processing.²¹

Concord has recognized a number of practices that have improved the process. The Concord City Code is available online. Applicants are assisted to overcome any problems encountered in order to streamline the process. For example, ANY developer may attend a

²¹ NOI ¶¶ 14, 29.

meeting with representatives of all affected City Departments in order to have a single, expedited review.²²

There have been occasions when “single dig” / joint trenching procedures have been successful, especially where the City provides the conduit and coordinates the project. Timing is difficult as the communication companies are often not on the same schedule of rehabilitation or repair of their facilities. Information as requested is provided by Concord as to their facilities in order to help speed processing. Delays by the communication companies in relocating infrastructure are common. Small pole attachment projects are largely routine and are handled efficiently by both parties.²³

VII. Permitting Charges.

The Commission seeks data “on current permitting charges, including all recurring and non-recurring charges, as well as any application, administrative, or processing fees.” Specifically, the Commission asks commenters to identify:

- the type of facilities for which such charges are assessed;

This topic is discussed *supra* in section II. nd III. above.

- how such charges are structured (e.g., per foot or percent of revenue in the case of rights of way fees);

Concord does not charge per-foot fees. Charges are assessed primarily for processing applications or for the rent of City property.

²² City of Concord Code of Ordinances, Concord Development Ordinance §2.6 Development review Committee (2011 edition.)

²³ See §II. B. *supra*.

- whether the community is subject to comprehensive state franchising or rights-of-way-laws;

Concord is subject to state-wide franchising.

- whether the charges are published in advance or individually negotiated, designed to approximate market rates or merely recover costs (direct and/or indirect), and accompanied by comprehensive terms, and conditions; and

This subject is discussed above. The rents for City-owned property are negotiated on a case-by-case basis. However, all such agreements are public records.

- the value of any in-kind contributions required for access or permit approval.

As discussed above, Concord does not recover its costs for encroachments in the City's ROW.

The Commission further asks whether such charges are related to impacts on the local community, such as pavement restoration costs for projects that involve trenching in roadways.²⁴

Concord requires all persons cutting City streets to patch the cuts to City standards. However, numerous patches shorten the life of the pavement.²⁵

VIII. Local Policy Objectives.

The Commission asks what “policy goals and other objectives” underlie the local practices and charges in this area.²⁶

In Concord, our policies are designed to achieve the following:

- Keep up with the use of the ROW and the specific location of non-City-owned infrastructure;

²⁴ NOI ¶ 17.

²⁵ Telephone call, Lex Patterson, PE, Deputy Director of the Transportation Service Dept., Concord NC.

²⁶ NOI ¶ 22.

- facilitate the responsible deployment of services;
- make the services broadly available;
- ensure public safety;
- avoid traffic disruption;
- maintain and repair roadways;
- prevent public disruption and damage to abutting property;
- minimize accelerated deterioration to roads that accompanies street cuts;
- satisfy aesthetic, environmental, or historic preservation concerns;
- avoid damage to the property of others; and
- except for ROWS, obtain fair compensation for use of public property, to the extent possible and to encourage competition.

IX. Possible Commission Actions.

Finally, the Commission asks what actions the Commission might take in this area.²⁷

As noted above, Concord strongly urges the FCC to refrain from regulating local right-of-way management and facility placement processes. These are highly fact-specific matters, which turn on local engineering practices, local environmental and historical conditions, local traffic and economic development patterns, and other significant local community concerns and circumstances. These matters are best managed by local staff with considerable local expertise. Imposing a federal regulatory regime would create unnecessary costs for our community, and it would have the potential to undermine important local policies. Likewise, Commission regulation of charges for use of the rights-of-way could have significant impacts on the

²⁷ NOI ¶ 36.

community, and may actually make it infeasible to continue to maintain or provide important public services. If the Commission feels compelled to act in this area at all, it should limit itself to voluntary programs and educational activities, and to implementing its own recommendations in the National Broadband Plan for working cooperatively with state and local governments.

X. Conclusion

Concord urges the Commission to conclude that right-of-way and facility management and charges are not impeding broadband deployment. As indicated above, in Concord, our policies and procedures are designed to protect important local interests, and have done so for many years. There is no evidence that the policies have impaired any company from providing broadband service here, and there are many reasons to believe that federal regulations would prove costly and disruptive to our community.

In addition, Concord supports, endorses and adopts by reference the **COMMENTS OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE UNITED STATES CONFERENCE OF MAYORS, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND THE AMERICAN PUBLIC WORKS ASSOCIATION.**

RESPECTFULLY SUBMITTED, this July 18, 2011.

CITY OF CONCORD,
a North Carolina municipal corporation

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